

# **The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A ‘Toolbox’ rarely used?**

## *Abstract*

This article examines the provisions for international cooperation in the UN Convention and Transnational Organised Crime (UNTOC) and their effectiveness in achieving the UNTOC’s goal of promoting effective cooperation in the prevention and combating of transnational organised crime. It is a response to the growing sense that the UNTOC is not as effective a tool as promised, which sense is exacerbated by the absence of a functional review mechanism for the UNTOC. The article notes the delimitation of the scope of the UNTOC based on organised crime groups that participate in serious transnational crime. It then goes on to describe the UNTOC’s provisions for informal law enforcement cooperation, mutual legal assistance, international cooperation in asset recovery and extradition, and examines what little evidence there is of the implementation of these provisions. It concludes that the UNTOC appears to have been more successful as a tool for promoting informal rather than formal cooperation, and speculates as to why this may be so.

by Neil Boister\*

## **1. Introduction**

The UN Convention against Transnational Organised Crime<sup>1</sup> (Palermo Convention, UNTOC or UNCTOC) adopted in Palermo in 2000, enjoys almost universal subscription by States. As at May

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<sup>1</sup> The United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, 2225 UNTS 209, in force 29 September 2003. See generally the contributions to H. Albrecht and C. Fijnaut, eds., *The Containment of Transnational Organised Crime: Comments on the UN Convention of December 2000*, (Freiburg im Breisgau: Edition Iuscrim, 2002); the contributions to S. Betti, ed., *Symposium The United Nations Convention against Transnational Organised Crime: requirements for effective implementation* (Turin: UNICRI et al, 2002); R.S. Clark, ‘The United Nations Convention against Transnational Organized Crime’, 50 *Wayne Law Review* (2004) 161; C.D. Guymon, ‘International Legal Mechanisms for Combating Transnational Organised Crime’ 18 *Berkeley Journal of International Law* (2000) 53; M. Joutsen, ‘International Cooperation against Transnational Organized Crime: Criminalizing Participation in and Organized Criminal Group’, 59 *UNAFEI Resource Materials* (2002) 417; D. McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford: Oxford

2015 it has 185 States parties.<sup>2</sup> Its explicit goal as spelled out in article 1 is to ‘promote co-operation to prevent and combat transnational organised crime more effectively’. A complex of articles delimits the scope of the UNTOC on the basis of what is an organised criminal group, a serious crime, a transnational crime, and then the UNTOC obliges States parties to criminalise participation in an organised criminal group, money laundering, corruption and obstructing justice. Much of the academic literature on the UNTOC is devoted to exploring this criminalisation dimension.<sup>3</sup> The great bulk of the convention is devoted to the procedural matters of international cooperation against this transnational organised crime. This procedural dimension, which ranges from informal police cooperation to formal legal assistance, is so elaborate that its very detail suggests that international cooperation rather than criminalisation is in fact the main subject matter of the UNTOC. The focus of this article is on this framework of rules for cooperation. It is driven by the sense that these rules are under-utilised and that fifteen years after its adoption the UNTOC’s aims of promoting co-operation to prevent and combat transnational organised crime more effectively have not been fully realised. Participants in a conference held in 2010 which focussed in part on the performance of the UNTOC considered it disappointing.<sup>4</sup> The 2015 Doha Declaration on Integrating Crime Prevention and Criminal Justice into the wide UN Agenda calls on States parties ‘to implement and make more effective use of’ the UNTOC.<sup>5</sup> These implicit doubts should be seen in the context of a general perception that the crime suppression conventions have as Dandurand and Chin note ‘not yielded their expected dividends in terms of effective

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University Press, 2007); T. Obokata, *Transnational Organised Crime in International Law* (Oxford: Hart, 2010), pp. 25-80; A. Orlova and J. Moore, ‘“Umbrellas” or “Building Blocks”? Defining International Terrorism and Transnational Organised Crime in International Law’, 27 *Houston Journal of International Law* (2005) 267; A. Schloenhardt, ‘Transnational Organised Crime’ in N. Boister and R. Currie, eds., *The Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2014), p. 409; D. Vlassis, ‘The United Nations Convention against Transnational Organized Crime and its Protocols: A New Era in International Cooperation’, in *The Changing Face of International Criminal Law* (Vancouver, BC: International Centre for Criminal Law Reform and Criminal Justice, 2002) p. 75.

<sup>2</sup> United Nations Treaty Collection, Status, as at 28 May 2015 available at <[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12&chapter=18&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en)>.

<sup>3</sup> See, for example, N. Boister, ‘The UN Convention against Transnational Organised Crime’ in P. Hauck and S. Peterke, eds, *International Law And Transnational Organized Crime* (Oxford: OUP, forthcoming 2016).

<sup>4</sup> André Standing, rapporteur, “Transnational Organized Crime and the Palermo Convention: A Reality Check,” New York: International Peace Institute, December 2010, 9-12, available at file:///C:/Users/nboister/Downloads/Transnational%20Organized%20Crime%20and%20the%20Palermo%20Convention.pdf.

<sup>5</sup> The declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation, adopted at the 13th UN Congress on Crime Prevention and Criminal Justice, 12 -19 April 2015, Doha; UN Doc A/CONF.222/L.6, 31 March 2015.

international co-operation'.<sup>6</sup> The aim of this article is to examine the framework for international cooperation set out in the UNTOC and then to examine the scant evidence of how it is being used in practice so as to assess as far as possible how these cooperation provisions within the UNTOC are being used in cooperation against transnational organised crime.

## **2. The Concept of Organised Crime in the UNTOC and its relation to the Provisions for International Cooperation**

First, a brief explanation of the concept of organised crime embodied in the UNTOC is called for, because it is from this peg that the provisions for cooperation hang. Despite enthusiasm from some delegations for a model that would describe the sociological nature of organised crime and the typical activities organised criminals engaged in, the authors of the UNTOC were unable to reach agreement on a definition of organised crime. They settled instead on a scheme that defined the scope of the UNTOC using three elements.<sup>7</sup> First, an 'organized criminal group' (OCG) defined in article 2(a) of the UNTOC as:

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Such a group must be 'structured' but according to article 2(c) only in the very limited sense 'that [it] is not randomly formed for the immediate commission of an offence'; it 'does not need to have formally defined roles for its members, continuity of its membership or a developed structure'. The second element, provided for in article 2(b), defines 'serious crimes' as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'. The third element, provided for in article 3(2), defines what makes an offence 'transnational' for the purposes of the UNTOC: if,

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<sup>6</sup> Y. Dandurand and V. Chin, 'Implementation of Transnational Criminal Law' in N. Boister and R. Currie, eds., *The Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2014), p. 437, p. 441.

<sup>7</sup> See UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto*, New York: United Nations, 2006, UN Pub. Sales No. E.06.V.5, p. xxii.

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

These three elements come together in article 3(1), entitled ‘Scope of Application’:

- 1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:
  - (a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and
  - (b) Serious crime as defined in article 2 of this Convention;
 where the offence is transnational in nature and involves an organized criminal group.

Under article 3(1)(a) the UNTOC applies to the ‘prevention, investigation and prosecution of’ the specific organisational and logistical offences of participation in an organised criminal group as defined in article 5, money laundering as defined in article 6, corruption as defined in article 8 and obstructing justice as defined in article 23 (in some of these definitions the OCG, serious crime and transnational elements play a definitional role). It also applies to the offences in the UNTOC’s three Protocols, the Human Trafficking Protocol,<sup>8</sup> Migrant Smuggling Protocol<sup>9</sup> and Firearms Protocol<sup>10</sup> in virtue not of article 3(1) but through provision in the protocols themselves.<sup>11</sup> Finally,

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<sup>8</sup> Protocol to Prevent, Suppress, Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, New York, 15 November 2000, 2237 UNTS 319, in force 25 December 2003.

<sup>9</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, New York, 15 November 2000, 2241 UNTS 507, in force 28 January 2004.

<sup>10</sup> Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, New York, 31 May 2001, 2326 UNTS 208, in force 3 June 2005.

<sup>11</sup> See, for example, Article 3(1) of the Human Trafficking Protocol.

under article 3(1)(b) the UNTOC applies to all residual serious crimes (as determined by the parties themselves simply by making the maximum punishment more than four years deprivation of liberty) when the offence is transnational and involves an OCG. Article 15 also makes provision for the jurisdiction to prosecute and punish such crimes through mandatory provisions basing jurisdiction on territoriality and ship and aircraft jurisdiction and permissive provisions based on passive personality, nationality, residence of a stateless person, jurisdiction in observance of the *aut dedere aut judicare* principle, and jurisdiction where the offences involves extra-territorial participation in an OCG or money-laundering, with a view to committing an intra-territorial serious crime. Taken as a whole, the UNTOC's criminalisation scheme focuses on the nature of the group (in a very limited way), and on the cross border nature of their activities (in a very broadly drawn sense), but not on the specific kinds of crimes they engage in. In this respect, as Clark memorably puts it, the UNTOC is largely 'specific content free'.<sup>12</sup> The net outcome is a remarkably flexible instrument with a very low threshold set of conditions for its operation in the 'prevention, investigation and prosecution of the UNTOC's specific crimes and serious crimes. This is not surprising because although the idea of a treaty against transnational organised crime was supported by developing states as a more accountable way of responding to transnational organised crime while the UNTOC was initially greeted with scepticism by the WEOG States, once the UNTOC's development had begun the latter took the opportunity to multi-lateralise a range of existing regional and bilateral measures developed for international cooperation.<sup>13</sup> The evidence suggests that they were far more interested in pursuing the development of a 'tool box' on modes of international cooperation than in reaching agreement on the conceptual issue of defining transnational organised crime. As Orlova and Moore record:

according to the chief Canadian negotiator of the Palermo Convention, Keith Morrill, defining organized crime in the Convention was really a secondary issue. The primary concentration was on working out the "co-operation provisions" of the Convention (that is, extradition, mutual legal assistance and police co-operation). In other words, what was hoped would be accomplished was not a convention that provides a comprehensive definition of organized crime, but rather a convention that serves as a "tool box" to enable

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<sup>12</sup> See Clark, *op. cit.*, p.169.

<sup>13</sup> See Vlassis, *op. cit.*, pp.79-80.

the functioning of various "co-operation provisions." Thus, the definition of an organized criminal group, contained in Article 2, alongside other provisions of the Convention, serves the utilitarian purpose of accommodating the provisions dealing with extradition, mutual legal assistance and police co-operation.<sup>14</sup>

Cooperation is necessary because as article 4(2) makes clear, the States parties to the UNTOC agree that sovereignty forbids the unilateral use by one State party of its law enforcement authority in another.<sup>15</sup> The UNTOC contains the 'minimum'<sup>16</sup> procedural framework to be used to enable cooperation in regard to the UNTOC and Protocol offences. Some of these measures are to be implemented at the national level and some to enable international cooperation. The UNTOC expanded upon established means of international cooperation such as extradition and mutual legal assistance to a greater number of parties and introduced informal direct law enforcement cooperation and special investigative techniques. Language was included in these provisions specifically to make it possible to establish the involvement of an organised criminal group and the transnationality of its activities – the triggers for the application of this cooperation regime.<sup>17</sup> Although these provisions reflect the assumptions of what was possible in law enforcement at the time,<sup>18</sup> they did simplify the requirements for cooperation considerably. Verbruggen, comparing the UNTOC offences to the standard metal containers used in global trade, sums up the potential impact of the use of the container offences designed around the OCG's on the furnishing of international cooperation:

One can put the most varied issues in those standardised metal boxes: easy transport is guaranteed all over the globe. ... the boxes will match, however heterogenous their content. In a similar way "container offences" derive their criminality from a link with other offences which can be quite heterogenous. The advantage is clear: double criminality, a

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<sup>14</sup> See Orlova and Moore, *op. cit.*, p. 285 (footnotes omitted).

<sup>15</sup> This neutralizes the argument accepted in *United States v Alvarez Machain*, 504 US 655 (1992), that rendition is legal unless expressly forbidden. See O. Lagodny, 'Implementation of the Convention: The Sovereignty Issue' in Albrecht and Fijnaut, eds., *op. cit.*, pp. 165-6.

<sup>16</sup> M. Mackarel, 'Procedural Aspects of the Convention against Transnational Organized Crime' in Albrecht and Fijnaut, eds., *op. cit.*, p. 145, p. 147.

<sup>17</sup> Vlassis, *op. cit.*, p. 96.

<sup>18</sup> M.E. Beare, 'Shifting Boundaries – between States, Enforcement Agencies, and Priorities' in Albrecht and Fijnaut, eds., *op. cit.*, p. 171.

classical requirement in international cooperation against transnational crime is no longer an issue. Instead of harmonising all the different predicate offences, it is enough to standardise the boxes.<sup>19</sup>

He also points out the obvious drawbacks: ‘since the boxes are closed, it becomes harder to control what they really contain.’<sup>20</sup> The inherent proportionality between the seriousness of the basic offence and level of cooperation offered by a requested State party is placed at risk, because cooperation becomes conditional on matching extremely flexible organisational or logistical offences. Is the mutual trust necessary for cooperation a victim as some assert?<sup>21</sup> While a comprehensive survey of the UNTOC’s international cooperation provisions is impossible here, some sense of what it provides is given below. However, before doing so it is useful to point out the provisions for implementation in the UNTOC, as they set the context for examination of States parties’ implementation of these cooperation elements.

### **3. Provisions for Implementation**

In terms of article 34(1) the States parties are required to take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of their domestic law, to ensure implementation. Provision is made in article 30(2)(b) for States parties to enhance their financial and material support for implementation by developed States, while article 30(2)(c) provides for technical assistance. Contributions have been made,<sup>22</sup> but there are always calls for more assistance.<sup>23</sup> Whether States parties are in fact taking the necessary measures to implement the procedural provisions in the UNTOC remains an open question because the main follow-up mechanism for implementation provided by article 32, the Conference of the Parties (COP), while enjoined to periodically review the implementation of the UNTOC, has failed to adopt a review mechanism. Regular discussion of the adoption of this mechanism since its first

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<sup>19</sup> F. Verbruggen, ‘On Containing Organized Crime Using “Container Offences”’: Some Reflections on Substantive Criminal Law Issues in, Albrecht and Fijnaut, eds., *op. cit.*, p. 113, pp. 129-130.

<sup>20</sup> Verbruggen, *op. cit.*, p.130.

<sup>21</sup> F. Calderoni, ‘A Definition that Does not Work: The Impact of the EU Framework Decision on the Fight against Organized Crime’, 49 *Common Market Law Review* (2012), p. 1365, p. 1390.

<sup>22</sup> In the period 2013 to 2014, the US gave \$27.2 million to the UNODC in technical assistance to fight transnational organized crime Vienna, UNCCPCJ, Wednesday 20 May 2015 (notes on file with the author).

<sup>23</sup> The African group at the 2015 UN Commission on Crime Prevention and Criminal Justice (UN CCPCJ) called for more technical assistance to fight the evolving nature of transnational organized crime. Vienna, Monday 18 May 2015 (notes on file with the author).

session held in 2004 has not produced the unanimity required for a decision with budgetary implications<sup>24</sup> because States parties, having been exposed to the operation of the review mechanisms for other crime suppression conventions, fear the potential financial<sup>25</sup> or human resources<sup>26</sup> costs of the system. Exhortations from the UN General Assembly in Resolution 67/189 of 20 December 2012 to actively engage in endeavouring to agree such a mechanism<sup>27</sup> has as yet not produced any fruit. Concern about performance is also reflected in the statement of regional organisations<sup>28</sup> and the complaints within the UN Commission on Crime Prevention and Criminal Justice (UN CCPCJ) about shortcomings in implementation.<sup>29</sup> The pith of these concerns is revealed in the statements by the Mexican delegate that ‘transnational challenges require collective action by all States....pretending to do so benefits no one’<sup>30</sup> and by the US delegate that ‘[w]e do not have a shortage of conventions, what we have is a gap in their implementation.’<sup>31</sup> It is difficult to assay the accuracy of these sentiments because we only have patchy information on the implementation of the UNTOC’s international cooperation provisions. Undaunted, let us turn now to the nature of these provisions, and what little information there is on their implementation.

#### **4. International Police Cooperation**

Earlier crime suppression conventions such as the 1988 UN Drug Trafficking Convention focussed on international legal cooperation but not on police cooperation.<sup>32</sup> Article 27(1) of the UNTOC in contrast takes a broad approach encompassing all forms of cooperation. It establishes a general obligation on States parties to ‘enhance the effectiveness of law enforcement action’ against the UNTOC offences. It obliges them to adopt effective measures such as improving channels of communication between law enforcement agencies. Research indicates that more informal cultures

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<sup>24</sup> Rule 58 of the COP’s Rules of Procedure require unanimity in making such a decision.

<sup>25</sup> Vienna, UNCCPCJ, Tuesday 21 May – statements by Canada, Norway, and Austria (notes on file with the author).

<sup>26</sup> Vienna, UNCCPCJ, Wednesday 20 May 2015 (notes on file with the author).

<sup>27</sup> UN Doc A/RES/67/189\*, 20 December 2012.

<sup>28</sup> See for example, OSCE Decision non 5/06 on Organised Crime, MC/DEC.5/06, 5 December 2006; OAS Hemispheric Plan of Action against Transnational Organized Crime, adopted by the Permanent Council through resolution CP/RES. 908 (1567/06) in 2006.

<sup>29</sup> Asia Pacific Group, Latin American Group, EU all complained in this regard at the UNCCPCJ 18 May 2015 (notes on file with the author).

<sup>30</sup> UNCCPCJ 18 May 2015 (notes on file with the author)..

<sup>31</sup> UNCCPCJ, 18 May 2015. The French were of much the same opinion, UNCCPCJ 20 May 2015 (notes on file with the author).

<sup>32</sup> Albrecht, ‘Introduction’, in Albrecht and Fijnaut, eds., *op. cit.*, p. 16.



of cooperation are likely to be more rewarding.<sup>33</sup> It suggests that police to police requests for help are essential for success in practical terms and the mutual legal assistance serves merely to formally legalize this process.<sup>34</sup> Anecdotal evidence also suggests that simple knowledge of another State's system (in its entirety) is crucial to successful cooperation.<sup>35</sup> Article 27(1)(b) provides for the expansion in the scope of cooperation in the conduct of specific inquiries relating to 'offences covered by' the UNTOC, which must be taken to include serious crimes. It provides inter alia for duties to furnish requesting States parties with information on the modus operandi used by organised criminal groups and the tracking and tracing of suspects, the proceeds of crime, and property used in crime. Article 27(2) urges them to adopt complementary measures to enhance this cooperation.

Article 28 requires States parties to collect and share information on trends in organized crime. Initial attempts by Europol and Interpol to quantify the number of groups in each country engaged in organized crime were abandoned when it became clear that there was no common methodology for identifying them and their fluid nature made collecting information difficult. The emphasis has shifted to collecting information about the activities that these groups take part in, which is more in line with the view of organised crime as networks for facilitating criminal activity.<sup>36</sup>

In regard to more specific policing measures, article 19 provides for the creation of joint investigation teams either by specific agreement or on an ad hoc basis while article 20 provides for special investigative techniques such as electronic surveillance and controlled delivery. Article 26 provides for the use of undercover operations and informers. These provisions are simple frameworks; they do not provide detailed regulation of how to engage in these practices.<sup>37</sup> States are left to their own devices. Provision is made in the UNTOC for training and technical assistance in this regard.<sup>38</sup>

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<sup>33</sup> M.E. Beare, 'Shifting Boundaries – between States, Enforcement Agencies, and Priorities' in Albrecht and Fijnaut, eds., *op. cit.*, p. 171, p. 189.

<sup>34</sup> *Ibid.*

<sup>35</sup> R. Ciaffa, 'The Palermo Convention and International Cooperation between Police Forces' in Betti, ed., *op. cit.*, p. 79, p. 80.

<sup>36</sup> See J. van Dijk and T. Spapens, 'Transnational Organized Crime Networks Across the World' in J. Albanese and P. Reichel, eds., *Transnational Organized Crime, A View from Six Continents* (Los Angeles etc.: Sage, 2014), p. 7, p. 11.

<sup>37</sup> Mackarel, *op. cit.*, p. 153.

<sup>38</sup> Art. 29.

No consolidated information exists as to either the levels of law enforcement cooperation afforded or the use of special investigative techniques at a global level under the auspices of the UNTOC. The UNODC has collected examples of cases of law enforcement cooperation in the case law database of its SHERLOC portal (Sharing Electronic Resources and Laws on Crime).<sup>39</sup> These 78 cases<sup>40</sup> show a pattern similar to that in more formal forms of legal and judicial assistance (see further below): the participation of police forces mainly from WEOG states but with increasing involvement from law enforcement agencies in GRULAC and Eastern European States, and significant powers in the other regions. The UNTOC usually only frames the assistance provided; it is commonly based on regional and bilateral treaties or MOUs or cooperation through Interpol. The forms of assistance include the full range of activities anticipated by the UNTOC – joint investigations, electronic surveillance, and under-cover operations, in addition to direct exchange of investigative information. The targets are criminals involved in the full range of offences within the scope of the UNTOC as well as other serious transnational offences. Other sources indicate that there has been quite dramatic progress in Europe in the institutional development of international law enforcement cooperation against transnational organized crime.<sup>41</sup> Progress has also occurred globally. Shortly after the adoption of the UNTOC a rise in law enforcement cooperation against transnational organised crime was illustrated by the arrests of Russian OCGS in Italy, investigations in Bank of New York cases and detentions in France.<sup>42</sup> The establishment of the Commission for the Investigation of Clandestine Security Organisation (CICIACS) in Guatemala, indicated similar enforcement activity in Central America.<sup>43</sup> In Africa, information is sparse though the use of techniques is spreading. For example, in a 2010 case which runs against the general trend of high level West African officials cooperating with drug traffickers rather than foreign law enforcement, cocaine dealers who met with Liberian Security Agency directors with the intention of bribing them discovered that the directors were actually working with the US DEA

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<sup>39</sup> See UNODC, SHERLOC, <http://www.unodc.org/cld/index-sherloc.aspx>.

<sup>40</sup> Available specifically at [http://www.unodc.org/cld/search-sherloc-cld.aspx?&f=caseLaw.crossCuttingIssues.internationalCooperation.measures.measure\\_s%3AInternational%5C+law%5C+enforcement%5C+cooperation%5C+%5C%28including%5C+INTERPOL%5C%29](http://www.unodc.org/cld/search-sherloc-cld.aspx?&f=caseLaw.crossCuttingIssues.internationalCooperation.measures.measure_s%3AInternational%5C+law%5C+enforcement%5C+cooperation%5C+%5C%28including%5C+INTERPOL%5C%29).

<sup>41</sup> See C. Fijnaut, 'European Union Organized Crime Control Policies' in L. Paoli, ed., *The Oxford Handbook of Organized Crime* (Oxford: OUP, 2014), pp. 574 *et seq.*

<sup>42</sup> B. Zagaris, 'Arrests in Europe indicate Progress in Russian Transnational Crime Investigations', 18(8) *International Law Enforcement Reporter* (2002) 324-5.

<sup>43</sup> B. Zagaris, 'UN and Guatemala form Unit to Prosecute attacks against Human Rights Groups', 20(4) *International Law Enforcement Reporter* (2004) 149.

in an undercover operation.<sup>44</sup> When the UNTOC was adopted it was feared that its emphasis UNTOC on more expansive forms of cooperation would foster a transnational cooperation increasingly dominated by the police and in which the judiciary are being marginalised.<sup>45</sup> There are indications to suggest that the UNTOC is playing a role in fostering trust among law enforcement agents, if only by encouraging direct contact and a broader view of what is possible. Whether this is at the expense of judicial control of criminal processes generally is not clear, although there are isolated examples that suggest it is.<sup>46</sup>

## **5. Modes of International Legal or Judicial Cooperation**

### ***5.1 The Framework for Mutual Legal/Judicial Assistance***

Article 18 of the UNTOC, a very detailed mini mutual legal assistance treaty in its own right, frames mutual assistance under the UNTOC. It is an attempt to overcome the problems of longwindiness and obstructive formality inherent in rogatory processes that require the use of the diplomatic channel to funnel requests for assistance and the use of foreign courts to supervise and authenticate the taking of evidence.<sup>47</sup> It tries to do so among a large group of States parties that do not have extant legal assistance arrangements of a more direct and informal kind.

Article 18(1) obliges States Parties to afford each other ‘the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings’ in relation to the offences ‘covered by this Convention as provided for in article 3’. These offences must thus include domestically defined ‘serious crimes’ in addition to the organisational and logistical offences the UNTOC creates. The States parties must reciprocally extend to one another similar assistance where the requesting State party has reasonable grounds to suspect that the offence ‘is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and that the offence involves an organized criminal

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<sup>44</sup> B. Zagaris, ‘US and Liberia Undercover Sting against International Narcotics Trafficking Yields Dividends’, 26(8) *International Law Enforcement Reporter* (2010) 304.

<sup>45</sup> Albrecht, *op. cit.*, pp. 17-18 and sources cited there.

<sup>46</sup> See, for example, N. Boister, ‘Law Enforcement Cooperation between New Zealand and the United States: Serving the Internet ‘Pirate’ Kim Dotcom up on a ‘Silver Platter’?’ in S. Hufnagel and C. McCartney, eds., *Trust in International Police and Justice Cooperation*, (Oxford: Hart, forthcoming).

<sup>47</sup> S. Gless, ‘Obtaining Evidence Abroad – A European Approach’ in Albrecht and Fijnaut, eds., *op. cit.*, p. 133 at pp. 133-4.

group.’ This partial application of the UNTOC’s requirement of transnationality allows for assistance to be provided in the early phases of investigations when the evidentiary basis of the commission of an offence covered by the Convention and its Protocols may still be weak. It also provides for an enlarged notion of transnationality of the offence.<sup>48</sup>

Article 18(3) provides for an obligation to afford assistance in regard to a range of different purposes in taking evidence abroad including taking statements, service of judicial documents, search and seizure, providing information and evidence, tracing the process of crime and facilitating the appearance of witnesses. It contains guidelines as to the form the request should take in article 18(15) but only touches on conditions for legal assistance. For example, in regard to double criminality article 18(9) provides that the requested State may provide assistance ‘to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.’ The fiscal matters objection is specifically restricted by article 18 (22) and so too is bank secrecy through article 18(8) so neither can serve as a barrier to rendering assistance. To make the process of requesting these forms of assistance as efficient as possible article 18(13) requires the States parties to designate a Central Authority with the power and authority to receive requests and either execute them or transmit them to the competent authority. In terms of article 18(15) the Authority must ‘ensure the speedy and proper execution or transmission of the requests received.’

Execution of requests for assistance follow the law of the requested State on the principle *locus regit actum* and follows the procedures it insists upon (which may inevitably cause problems of reception of the evidence if rules of evidence and procedure of the requesting State have not been adhered to). Article 18(17) does allow for execution following the law of the requesting State, where such a procedure is specified in the request and is not contrary to the law of the requested State. Article 18(18) of the UNTOC provides for the use of video links so long as it is consistent with the fundamental law of the requested State Party, but like many of the UNTOC’s procedural provisions leaves it to further international arrangement to detail the process. In a procedure which appears to stand outside of the normal process, article 18(4) also provides for unsolicited transmission of material when the competent authority of the transmitting State Party believes the material could be of assistance in law enforcement.

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<sup>48</sup> The notion of serious crime in the United Nations Convention against Transnational Organized Crime, Note by the Secretariat. UN Doc CTOC/COP/2012/CRP.4, 20 September 2012, paragraph 15.

Article 18 thus provides a set of minimum standards for mutual legal assistance. It does not eliminate the material and procedural obstacles that mutual legal assistance faces,<sup>49</sup> because it does not compel major changes in domestic law and practice. But it does provide in article 18(6) for complementary mechanisms to be developed, and more exacting instruments have been developed at the regional level in Europe, for example. One way to streamline legal assistance is to transfer proceedings, provision for which is made in article 21.

### ***5.2 International Cooperation in Seizure and Confiscation of the Proceeds of Crime***

One specific area of elaborate development in mutual legal assistance in the UNTOC is the reinforcement of the provision made in article 12 for the seizure and confiscation of criminal proceeds, by processes spelled out in article 13 for international cooperation in confiscation matters. It requires a requested State party to take particular measures to identify, trace and freeze or seize proceeds of crime for purposes of eventual confiscation, and describes how such requests are to be drafted, submitted and executed. Finally article 14 provides for disposal of the confiscated assets in accordance with domestic law, but calls upon the disposing party to give priority to requests from other States parties for the return of such assets for use as compensation to crime victims or restoration to legitimate owners or to fund technical assistance activities under the UNTOC.

### ***5.3 Extradition***

Article 16(1) provides that article 16's provisions relating to extradition shall apply to the offences 'covered by' the UNTOC, which again must include the UNTOC offences and serious crimes. However, it confusingly also applies

in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

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<sup>49</sup> Gless, *op. cit.*, p. 142.

Article 16(1) thus applies the general condition of double criminality, the presence of the accused and involvement of an organised criminal group to the very same UNTOC offences and serious crimes.<sup>50</sup> But the condition of transnationality of the offence, as described in article 3(2) is partly lifted in the sense that article 16 only requires the presence of the accused on the territory of the requested state (which may have involved them crossing borders). Ultimately extradition under the UNTOC depends on (a) participation of an OCG in serious crimes as measured by the penalty threshold and (b) on the collective nature of the participation in these crimes. The consequences of the application of article 16 are spelled out in article 16(3), which includes the UNTOC offences and serious crimes as extraditable offences in any extant extradition treaties between the States parties with a promise to incorporate them in new treaties, and in article 16(4), which provides that the UNTOC itself may serve as ‘the legal basis for extradition in respect of any offence to which this article applies’. In terms of article 16(5) they must inform the Secretary General if they choose to do so upon ratification or accession, and while many States have indicated that they will do so<sup>51</sup> others have indicated they will not.<sup>52</sup> The majority remain silent, possibly because they may be able to do so on the basis of their legislation but do not want to commit themselves, or because they will insist on reciprocity. The particulars of and conditions for extradition, apart from the discrimination clause and nationality exceptions, are left to States parties. Article 16(10) is an extradite or prosecute obligation where State Party’s national is alleged to have committed an offence and it refuses on the basis of their nationality to extradite him, although it only requires submission of the case for prosecution without undue delay, it does not insist that prosecution must ensue. Supplementing extradition, article 17 provides for the transfer of prisoners.

#### ***5.4 Implementation of Legal Assistance and Extradition***

The key challenge in the provision of international cooperation for States parties that otherwise do not enjoy bilateral relations that enable legal assistance or extradition, is to try to use the UNTOC

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<sup>50</sup> McClean, *op. cit.*, p. 177, notes this is ‘frankly puzzling’.

<sup>51</sup> Algeria, Armenia, Azerbaijan, Bahamas, Belarus, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Cape Verde, Central African Republic, China, Cote d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Djibouti, Ecuador, Egypt, El Salvador, Estonia, Gabon, Guatemala, Guinea Bissau, Holy See, Italy, Jamaica, India, Kazakhstan, Kuwait, Latvia, Lithuania, Macedonia (FRY), Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Moldova, Monaco, Morocco, Netherlands, Niger, Panama, Paraguay, Philippines, Poland, Romania, Russian Federation, Sao Tome and Principe, Slovakia, Slovenia, St Vincent, Switzerland, Tanzania, Togo, Tunisia, Ukraine, Uzbekistan, Venezuela – see Status of Ratification, <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.

<sup>52</sup> Botswana, Burundi, Laos, Malaysia, Nepal, Pakistan, Singapore, St Lucia, United States, Yemen – see Status of Ratification, <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.

itself for this purpose, so as to avoid the necessity of the continual updating these bilateral relations require. Information in this regard is, in the absence of the institution of a formal implementation review mechanism by the UNTOC COP, difficult to obtain. However, the UNTOC COP in its third session charged the secretariat with gathering data concerning their reliance on the UNTOC to effect extradition, mutual legal assistance and other forms of international legal cooperation. The data gathered in 2008<sup>53</sup> and 2010<sup>54</sup> (which was supplemented<sup>55</sup>) reveals some interesting features of this cooperation.

Those States parties that were not prepared to grant assistance gave varied reasons for declining to do so most of which pertained to their inability to rely on a multilateral treaty for provision of assistance.

State	Form of Assistance	Crime	Reason for refusal
Venezuela (r.Lithuania)	extradition	n.a.	Grounds not intrinsic to UNTOC
Botswana (r. Montenegro)	extradition	n.a.	Requires bilateral treaty or membership of Commonwealth Scheme for Rendition
Burkina Faso	n.a.	n.a.	Lack of awareness in national jurisdiction
Kuwait (r. Lithuania)	extradition	OCG, others	Kuwait did not accept UNTOC as basis for extradition
Paraguay (r. various)	Extradition, confiscation	n.a.	Paraguay did not accept UNTOC for these purposes

<sup>53</sup> See Conference of the Parties to the United Nations Convention against Transnational Organised Crime, fourth session, 8-17 October 2008: Catalogue of examples of cases of extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime, UN Doc CTOC/COP/2008/CRP.2, 17 September 2008, available at <http://www.unodc.org/documents/treaties/COP2008/COP-2008-CRP2.pdf>

<sup>54</sup> See Conference of the Parties to the United Nations Convention against Transnational Organised Crime, fifth session, 18-22 October 2010: Catalogue of Cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime, UN Doc CTOC/COP/2010/CRP.5, 22 September 2010, available at [http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_CRP5/CTOC\\_COP\\_2010\\_CRP5\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_CRP5/CTOC_COP_2010_CRP5_E.pdf)

<sup>55</sup> See Conference of the Parties to the United Nations Convention against Transnational Organised Crime, fifth session, 18-22 October 2010: Catalogue of Cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime, Corrigendum, UN Doc CTOC/COP/2010/CRP.5/Corr.1, 18 October 2010 available at [http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_CRP5\\_CORR1/CTOC\\_COP\\_2010\\_CRP5\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_CRP5_CORR1/CTOC_COP_2010_CRP5_E.pdf)

Many States parties in strong regional systems such as the EU reported that they relied entirely on these regional arrangements when working within the region, while others such as Norway, Sweden and Switzerland did not require a convention for legal assistance so did not need the UNTOC. There were also a number of cases where requests were sent and no reply received, where States parties had no means of gathering the information requested (Belgium, Germany) or had not yet ratified (the UK).

The data for those States that were prepared to offer assistance is best represented in tabular form broken into the UN's regional groupings (I have omitted incomplete requests or requests where the outcome was unclear or unsuccessful):

### **African Group**

<b>State (requested/ requesting)</b>	<b>Legal Basis</b>	<b>Form of Assistance</b>	<b>Crime</b>
Morocco (r. Netherlands)	UNTOC	extradition	murder by an OCG
Cape Verde (r. Spain)	UNTOC	extradition	drug trafficking
Ghana (r. Spain)	UNTOC	extradition	drug trafficking

### **Asia-Pacific Group**

<b>State (requested/ requesting)</b>	<b>Legal Basis</b>	<b>Form of Assistance</b>	<b>Crime</b>
Philippines/ 17 identified states	UNTOC, bilateral and regional instrs.	MLA	n.a.
Philippines (r. 7 states)	UNTOC, bilateral and regional instrs.	extradition	n.a.
Lebanon (r. Spain)	UNTOC	MLA	terrorism
China (r. U.K.)	UNTOC	MLA	tax fraud, money laundering
U.A.E. (r. Spain) (r. Spain)	UNTOC UNTOC	extradition extradition	drug trafficking OCG

### **Eastern European Group**

<b>State (requested/ requesting)</b>	<b>Legal Basis</b>	<b>Form of Assistance</b>	<b>Crime</b>
Estonia (3 x r. US)	UNTOC, bilateral, Budapest Convention	extradition	computer related fraud
Poland	UNTOC	transfer of proceedings	drug trafficking
Slovenia (r. Uruguay) (r. U.S.)	UNTOC UNTOC, Budapest Convention	extradition extradition	drug trafficking cybercrime
Ukraine (r. Lebanon)	UNTOC	MLA	n.a.

### **Latin American and Caribbean Group (GRULAC)**



State (requested/ requesting)	Legal Basis	Form of Assistance	Crime
Mexico (r. Brazil) (r. Costa Rica) (r. Costa Rica)	UNTOC UNTOC UNTOC	MLA MLA MLA	drug trafficking human trafficking drug trafficking
Brazil (r. Italy) (r. Belgium) (r. Netherlands) (r. Switzerland) (r. France) 62 other cases	UNTOC, domestic law UNTOC UNTOC UNTOC UNTOC UNTOC, bilateral and regional instrs.	MLA, confiscation MLA, extradition MLA MLA MLA	n.a. n.a. OCG, extortion n.a. n.a. n.a.
Venezuela (r. Austria) (r. Spain)	UNTOC UNTOC	Extradition MLA	n.a. n.a.
Uruguay	UNTOC	MLA	OCG, drugs
Colombia (r. not clear)	UNTOC	confiscation	n.a.
Costa Rica (r. U.S.) (r. Spain) (r. Denmark) (r. Guatemala) (r. Ecuador) (r. Guatemala) (r. Nicaragua) (r. Guatemala) (r. Ecuador) (r. U.S.) (r. Netherlands) Guatemala)	UNTOC UNTOC UNTOC UNTOC UNTOC, regional m.o.u. UNTOC UNTOC UNTOC UNTOC UNTOC UNTOC UNTOC UNTOC	MLA MLA MLA MLA MLA MLA MLA MLA MLA MLA MLA MLA	money laundering money laundering drug trafficking money laundering n.a. money laundering pornography related money laundering human trafficking fraud drug trafficking money laundering
Argentina (r. various States)	UNTOC, regional and bilateral instrs.	MLA	human trafficking, UNTOC offences
Panama (r. Costa Rica)	UNTOC	MLA	money laundering
Nicaragua (r. Costa Rica)	UNTOC	MLA	human trafficking
Paraguay (r. various States)  (r. Spain)	UNTOC  UNTOC	MLA  MLA	human trafficking, drug trafficking n.a.

### Western European and Others Group (WEOG)

State (requested/ requesting)	Legal Basis	Form of Assistance	Crime
Monaco (r. Brazil)	UNTOC, domestic law	extradition	fraud corruption
US (r. Egypt)	UNTOC, bilateral treaty	MLA	online fraud, identity theft
Canada (r. various States)  (r. Slovenia) (r. New Zealand)	UNTOC when no extant bilateral UNTOC UNTOC, other treaties	MLA  Extradition MLA	n.a.  corruption drug trafficking
U.K. (r. Mauritius) (r. Costa Rica) (r. China)	UNTOC, other instrs. UNTOC UNTOC	MLA MLA MLA	drug trafficking corruption smuggling
Spain (r. Serbia)	UNTOC	confiscation	OCG, corruption

(r. Costa Rica)	UNTOC	MLA	n.a.
(r. Brazil)	UNTOC	MLA	money laundering
(r. Brazil)	UNTOC	MLA	fraud
(r. Ecuador )	UNTOC	MLA	money laundering
(r. Brazil)	UNTOC	MLA	n.a.
(r. Chile)	UNTOC	MLA	n.a.
(r. Brazil)	UNTOC	MLA	falsified documents
(r. U.S.)	UNTOC	MLA	robbery
(r. Brazil)	UNTOC	MLA	n.a.
(r. Serbia)	UNTOC	MLA	n.a.
(r. Brazil)	UNTOC	MLA	drug trafficking
(r. Ecuador)	UNTOC	MLA	drug trafficking
(r. Brazil)	UNTOC	MLA	n.a.
(r. Paraguay)	UNTOC	MLA	n.a.
(r. Paraguay)	UNTOC	MLA	n.a.
Turkey (r. Ukraine)	UNTOC, regional instrs.	MLA	human trafficking, OCG
Netherlands (r. U.A.E.)	UNTOC	extradition	robbery
(r. Dominican Republic)	UNTOC	extradition	murder by an OCG
New Zealand (r. Romania)	UNTOC	MLA	fraud
(r. Canada)	UNTOC	MLA	fraud
(r. Netherlands)	UNTOC	MLA	arms trafficking
Norway (r. Brazil)	UNTOC	MLA	money laundering

### Unidentified requested State

State (requested/ requesting)	Legal Basis	Form of Assistance	Crime
23 unidentified states (r. Brazil)	UNTOC, domestic law	MLA, confiscation	money laundering
10 unidentified states (r. US)	UNTOC	extradition, MLA	Fraud, weapons trafficking

The data in these tables is by no means comprehensive but it does give a flavour of the activity undertaken. Generally the table suggests fairly consistent activity in the Western hemisphere and Europe with a negligible activity occurring elsewhere, which is unsurprising given that the UNTOC although driven by developing states initially had begun by the end of negotiations to be viewed somewhat sceptically by developed states as a vehicle for expensive obligations potentially intrusive on their sovereignty.<sup>56</sup> This is unfortunate given that for States without developed regional and bilateral relations the UNTOC presents the only option as the basis for international cooperation.

It also indicates some differences in regard to the legal basis on which States parties offered assistance. Some were prepared to do so on the basis of the UNTOC alone, some on the UNTOC

<sup>56</sup> Vlassis, *op. cit.*, pp. 90-1.

in conjunction with domestic legislation and some on the UNTOC in conjunction with other regional extradition or specific crime suppression treaties or bilateral extradition treaties (these States usually gave the impression in their reports that these other treaties played a more significant role in providing that platform).

The reports indicate that there were more requests for MLA than extradition. MLA is in practice usually a precedent to the extradition, it's usually cheaper, and it's less administratively burdensome or likely to engage as much judicial supervision.

In regard to the types of crime for which assistance was offered, there was negligible assistance offered for participation in an organised criminal group criminalised under article 5 of the UNTOC and nothing in regard to obstruction of justice which is criminalised under article 23 of the UNTOC. There was a great deal of activity around money laundering criminalised under article 6 of the UNTOC and human trafficking criminalised in the Human Trafficking Protocol, and some activity in regard to corruption criminalised under article 8 of the UNTOC. There was little explicit preparedness to grant assistance specifically citing the provision for 'serious' crimes as defined using the four year or more punishment threshold set out in article 2(b) of the UNTOC, although there was a significant number of cases of assistance for drug trafficking and some cases of fraud, and a smattering of other crimes, many of which probably qualified as serious crimes.

What the reports show as a whole is that while the UNTOC has been used as the sole or partial basis for international cooperation either through MLA or extradition for certain rather typical forms of transnational crime, it appears to be generally perceived as a fall-back mechanism mainly for MLA requests for (probably) serious transnational crimes although not crimes specifically targeting OCGs. Most legal assistance requests are still made on a regional or bilateral basis. While the numbers of bilateral treaties and the frequency of requests by States parties appears to be increasing,<sup>57</sup> it is not clear to what extent the UNTOC frames progress of this kind in state practice or whether it makes any difference at all.

One can only speculate as to why the UNTOC had not by 2010 had as greater an impact on mutual legal assistance and extradition in regard to a broader range of crimes. One reason is obviously that some States had not yet become party. Some States parties may not have reformed

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<sup>57</sup> South Korea, for example, has adopted 76 extradition treaties and 72 mutual legal assistance treaties and while in 2005 it only handled 5 extradition and 33 mutual legal assistance requests by 2014 it was dealing with 45 extradition and 181 mutual legal assistance requests - UNCCPCJ, 18 May 2014 (notes on file with the author).

their domestic law to make it compatible with the obligations under the UNTOC or the use of the UNTOC as a platform of cooperation. They may not have adopted the institutional architecture to enable effective cooperation.<sup>58</sup> A further reason for non-reliance on UNTOC may have been concerns about human rights when potentially opening up the Pandora's box of cooperation with so many States parties. States reluctant to sign bilateral treaties with non-parties to the ICCPCR because of wariness of harsh penalty regimes,<sup>59</sup> may not have been as prudent when signing the UNTOC and wake up to discover they are in a legal cooperation relationship with a State with a questionable human rights record. Albrecht noted in 2002 that 'globalized responses to global threats carry also the risk of triggering the strong state and safety and security models, which put the focus on efficiency in crime and violence control to the disadvantage of human rights and the rule of law.'<sup>60</sup> The Expert Group which drafted much of the UNTOC did suggest incorporation of 'appropriate safeguards for the protection of human rights and to ensure compatibility with fundamental national legal principles.'<sup>61</sup> However, while the Protocols do have specific human rights protections built into them,<sup>62</sup> the UNTOC itself does not. Even though the UNTOC is being used as an extradition or legal assistance treaty it does not have the specific protection of human rights usually found in an extradition or legal assistance treaty. It may be to counter this omission that more recently regional organisations and groupings like the EU and GRULAC have called at the UNCCPCJ for respect for human rights and input from civil society in action against transnational organised crime.<sup>63</sup>

There is a paucity of more recent information about implementation of the UNTOC's legal assistance provisions. One exemplary rather than comprehensive source is the UNODC's

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<sup>58</sup> See, for example, D. E. Stigall, 'Countering Convergence: "Central Authorities" and the Global Network to Combat Transnational Crime and Terrorism' (2015) *Small Wars Journal* available at <http://smallwarsjournal.com/jnl/art/countering-convergence-%E2%80%9Ccentral-authorities%E2%80%9D-and-the-global-network-to-combat-transnational>.

<sup>59</sup> See, for example, B. Zagaris, 'Proposed France-China Extradition Treaty Raises Human Rights Issues', 23(3) *International Law Enforcement Reporter* (2007) 96; B. Zagaris, "PRC Promotes Negotiation of Extradition Treaties", 23(8) *International Law Enforcement Reporter* (2007) 296.

<sup>60</sup> Albrecht, *op. cit.*, p. 1, p. 2.

<sup>61</sup> *Travaux préparatoires, op. cit.*, p. xxiii.

<sup>62</sup> See for example article 2 of the Human Trafficking Protocol.

<sup>63</sup> UNCCPCJ, Wednesday 20 May, 2015, (notes on file with author).

SHERLOC case law data-base. For example, it lists ten cases in which the UNTOC was directly referred to as the basis for cooperation.<sup>64</sup>

States involved	Legal Basis	Form of Assistance	Crime
Italy, Japan, Switzerland	UNTOC, a wide range of multilateral and regional treaties	MLA, asset recovery	OCG, trafficking in cultural artefacts
Romania, Ecuador, Nicaragua	UNTOC	MLA	OCG, drug trafficking
Kenya, Netherlands, UK	UNTOC	MLA	OCG, drug trafficking
Italy, Romania	UNTOC	MLA	OCG, migrant smuggling
Serbia, Belgium, Sweden, Brazil, Italy, Argentina, Poland, Netherlands, South Africa, Montenegro	UNTOC, bilateral treaties, UN Drug Trafficking Convention	MLA, extradition	OCG, drug trafficking
Romania, Colombia	UNTOC	extradition	money laundering, tax avoidance, forgery
Italy, Poland	UNTOC, regional treaties	MLA, asset recovery	OCG, tobacco smuggling
Brazil, Netherlands, France, UK	UNTOC	MLA, asset recovery	money laundering
Serbia, Hungary, Austria	UNTOC, regional treaty	MLA	OCG, migrant smuggling
Serbia, US	UNTOC, bilateral treaty	MLA	OCG, money laundering

This list tends to suggest activity by the WEOG States and Eastern European States is usually based on regional or bilateral instruments; when it involves a State from other regions in the world the UNTOC can be used directly. The nature of the cooperation usually involves some form of mutual legal assistance or the use of cooperation in asset recovery; extradition is rare. The crimes are all transnational and involve membership of an OCG or money laundering, with a smattering of other trafficking and smuggling offences. When compared to the 26 cases in the list relating to cooperation in regard to extradition<sup>65</sup> the features of which are tabulated below, where the UNTOC was usually only indirectly implicated because of the nature of the offence involved, similar patterns of State practice emerge.

<sup>64</sup> See specifically [http://www.unodc.org/cld/search-sherloc-cld.jsp?&f=caseLaw.crossCuttingIssues.internationalCooperation.legalBasis.treaty\\_s%3AConvention%5C+against%5C+Transnational%5C+Organized%5C+Crime](http://www.unodc.org/cld/search-sherloc-cld.jsp?&f=caseLaw.crossCuttingIssues.internationalCooperation.legalBasis.treaty_s%3AConvention%5C+against%5C+Transnational%5C+Organized%5C+Crime).

<sup>65</sup> See specifically [http://www.unodc.org/cld/search-sherloc-cld.jsp?&f=caseLaw.crossCuttingIssues.internationalCooperation.measures.measure\\_s%3AExtradition](http://www.unodc.org/cld/search-sherloc-cld.jsp?&f=caseLaw.crossCuttingIssues.internationalCooperation.measures.measure_s%3AExtradition).

<b>States involved</b>	<b>Legal Basis</b>	<b>Form of Assistance</b>	<b>Crime</b>
Spain (r. Portugal) Brazil (r. Portugal)	UNTOC, regional treaty	MLA	OCG, drug trafficking
US, South Africa	n.a.	extradition	cyber fraud
Canada, Australia, Thailand, Philippines	n.a.	MLA, extradition,	migrant smuggling
Italy, France, Spain, Germany, Luxembourg	n.a.	MLA, extradition, , asset recovery	OCG, trafficking in cultural artefacts, money laundering
UK, Spain, France	n.a.	extradition	OCG, drug trafficking, asset recovery
US, Ukraine, Switzerland	bilateral agreements	MLA, extradition,	OCG, money laundering, asset recovery
Serbia, Belgium, Sweden, Brazil, Italy, Argentina, Poland, Netherlands, South Africa, Montenegro	regional treaties, UN Drug Trafficking Convention	MLA, extradition	OCG, drug trafficking
Romania, UK	regional treaties	MLA, extradition, asset recovery	OCG, human trafficking
UK, Switzerland, Netherlands	regional treaties	MLA, extradition	OCG, drug trafficking
Italy, Serbia, Austria, Slovenia, Germany, Montenegro	n.a.	MLA, extradition, asst recovery	OCG, drug trafficking, crimes of violence
Italy, Belgium, Norway, France, Lithuania, Germany, Netherlands	n.a.	MLA, extradition	OCG, drug trafficking
Switzerland, Former Yugoslavia, Germany	regional treaties	MLA, extradition, asset recovery	OCG, drug trafficking
Romania, Colombia	UNTOC	extradition	money laundering, tax avoidance, forgery
Morocco, Italy	n.a.	extradition	drug trafficking
Colombia, Venezuela, US	n.a.	MLA, extradition	OCG, drug trafficking
Venezuela, Switzerland, Spain, China, Germany, Italy, Panama, US, Colombia	n.a.	MLA, extradition	OCG, money laundering
Norway, Nigeria	n.a.	extradition	OCG, human trafficking
Austria, Sweden	n.a.	extradition	OCG, migrant smuggling
Australia, Malaysia	n.a.	extradition	migrant smuggling
Australia, Indonesia	n.a.	extradition	migrant smuggling
Indonesia, Australia	n.a.	extradition	Migrant smuggling
Colombia, US	n.a.	extradition	OCG, drug trafficking, crimes of violence etc

US, Romania, Latvia	n.a.	MLA, extradition	OCG, cybercrimes
US, Spain	n.a.	extradition	money laundering
US, Hungary	n.a.	MLA, extradition	OCG, money laundering, fraud
US, Netherlands	n.a.	extradition	OCG, cybercrimes
Australia, Thailand	n.a.	extradition	migrant smuggling

The most activity involves WEOG member States. Eastern European, Asia-Pacific and GRULAC States also show increased activity while Africa is represented only by its three most powerful economies. The legal basis for cooperation in most of these cases is not made clear but it is probably reliant on regional or bilateral treaties. The offences are a range of common transnational crimes many of which are defined in the UNTOC. SHERLOC also lists 61 cases in which the UNTOC was implicated in some fashion in mutual legal assistance and 27 in international cooperation in asset recovery, where similar patterns of activity are evident. Most of this activity is framed by the UNTOC rather than directly reliant on it. Overall the incidence of the use of the UNTOC as the sole basis for extradition and mutual legal assistance still appears to be low.<sup>66</sup> Some States parties have become increasingly reliant on it. China, for example, has not noted that it has dealt with more than fifty assistance requests from other parties under the UNTOC in the period 2003-15 and considered the UNTOC the ‘leading platform’ for such assistance.<sup>67</sup>

Greater efforts are going into the implementation of the UNTOC. Capacity building, mutual legal assistance and the other modes of cooperation have not been implemented in many States parties in Asia and the muted engagement of major players such as India suggests that regional responses are far from developing, and sovereignty concerns dominate.<sup>68</sup> The UNODC has recognised that criminal justice systems in the Middle East and North Africa are vulnerable to organized crime because inter alia they are under-resourced.<sup>69</sup> There has been some intervention, particularly at the regional level, with the long term goal being a network of networks. For example, the US and France funded the West African Network of Central Authorities and Prosecutors against Organised Crime (WACAP) through the UNODC, as a strategy for the implementation of

<sup>66</sup> Statement by Panama at UNCCPCJ, Wednesday 20 May 2015 (notes on file with author).

<sup>67</sup> UNCCPCJ, Wednesday 20 May 2015 (notes on file with author).

<sup>68</sup> See R. Broadhurst and N. Farrelly, ‘Organized Crime “Control” in Asia: Experiences from India, China and the Golden Triangle’ in L Paoli, ed., *The Oxford Handbook of Organized Crime* (Oxford: OUP, 2014), p. 634, pp. 649.

<sup>69</sup> UNODC, UNODC strengthens partnership in the Middle East and North Africa, 3 May 2010, para 3, available at <http://www.unodc.org/unodc/en/frontpage/2010/May/unodc-strengthens-partnership-in-the-middle-east-and-north-africa.html>.

the UNTOC.<sup>70</sup> At a more general level, the massive activity against terrorism post 9/11 tended to overshadow enthusiasm for action against transnational organized crime for at least a decade. In 2010 President Obama used executive orders to impose sanctions on named Transnational Criminal Organizations, signalling something of a cross pollination of approaches from terrorism, but also a renewed enthusiasm to attack transnational organised crime through public diplomacy.<sup>71</sup> The US President's 2011 Transnational Organised crime Strategy records the US's intention to 'leverage all possible areas of cooperation, including legal instruments such as the UN Convention against Transnational Organized Crime (the Palermo Convention) ... to obtain the assistance of international partners...'.<sup>72</sup> It continues:

The key challenge remaining is to promote wider implementation of the Conventions through support for capacity building and by otherwise encouraging international partners to dedicate the necessary political capital and resources toward realizing the potential of these groundbreaking instruments.<sup>73</sup>

In 2012 the US, for example, began a still ongoing attempt to use the UNTOC directly to extradite the alleged cybercriminal Kim Dotcom from New Zealand to the United States to face copyright infringement and racketeering, and money laundering charges, crimes not listed in the 1970 extradition treaty between the two States,<sup>74</sup> but something enabled by the recognition in section 101B(1) of the New Zealand Extradition Act 1999 of participation in an OCG committing serious transnational crimes as extraditable.<sup>75</sup>

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<sup>70</sup> See, UNODC Website, <http://www.unodc.org/westandcentralafrica/en/newrosenwebsite/criminal-justice-system/wacap.html>.

<sup>71</sup> B. Zagaris, 'Obama Executive Order Imposes Sanctions on Transnational Organised Crime Groups', 27(10) *International Law Enforcement Reporter* (2011) 925-7.

<sup>72</sup> US President's Strategy to Combat Transnational Organized Crime, July 2011, 26, available at [file:///H:/My%20Documents/Research%20-%20ongoing/TCL/Materials/TOC/Strategy\\_to\\_Combat\\_Transnational\\_Organized\\_Crime\\_July\\_2011.pdf](file:///H:/My%20Documents/Research%20-%20ongoing/TCL/Materials/TOC/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf).

<sup>73</sup> *Ibid.*, p. 28.

<sup>74</sup> US - New Zealand Extradition Treaty, 12 January 1970, TIAS 7035, 22 UST 1; in force 8 December 1970.

<sup>75</sup> *United States district Court for the Eastern district of Virginia versus Kim Dotcom, Megaupload Limited, Vestor Limited, Finn Batato, Julius Bencko, Sven Echternach, Mathias Ortmann, Andrus Nomm, and Bram Van Der Kolk*, Superseding Indictment, 16 January 2012, Criminal No 1:12CR3.



## **6. Conclusion**

The UNTOC does not establish a Procrustean system, forcing a range of different forms of organisation of criminal behaviour into a single definition of organised crime. Indeed, its material scope is remarkably capacious – it can in principle serve as a vehicle for international cooperation in regard to all kinds of serious crimes where there is a cross border element. But the ad hoc (and obviously limited) evidence of its performance in the promotion of cooperation examined here suggests that were a mutual review system successfully adopted by the UNTOC COP it would expose significant global gaps in its implementation. When law enforcement officials from one State approach another the UNTOC can provide a useful framework to engage in international cooperation, and there are indications it is being used for this purpose. However, when the approach requires legal assistance or extradition the record is less impressive. In these situations if the requesting State is one with which it enjoys strong relations it can use the UNTOC to frame cooperation based on existing bilateral or regional treaty relations or in absence thereof try to rely on the UNTOC itself. If the State is one with which it usually has little to do and has no other extant relations it may try to rely on the UNTOC itself but the prospect of success is dimmer. While there does not appear to be any legal reason why a multilateral treaty such as the UNTOC can serve to either frame cooperation or as the basis for cooperation, for many States the prospect of actually being required to cooperate with any one of all the other 184 States parties to the UNTOC is probably more than they can stomach politically. In this regard by signing the UNTOC they potentially opened a ‘Pandora’s toolbox’. The adoption of a formal review procedure for the UNTOC will enable a better picture of the performance of the UNTOC to facilitate effective cooperation against transnational organised crime. It might also provide more information about that more important ‘known unknown’: whether the UNTOC is having any real impression on transnational organised crime.